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### "You start to feel really alone"

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## ‘You start to feel really alone’: Defence lawyers and narratives of international criminal law in film

*Abstract:* How do defence lawyers present international criminal law? In two documentaries – *The Trial* and *War Don Don* – defence lawyers critique international criminal law, and its inability to examine interactions between perpetration and victimhood or the structural causes of conflict, its inability to determine ‘truth’, and its impetus towards conviction.


The typical telling of international criminal law – whether in academic writing, or in cinematic depictions – will often focus on the victim,<sup>1</sup> or on the interventionist prosecutor or court,<sup>2</sup> or on the individual accused.<sup>3</sup> The defence lawyer is not a common protagonist in the narrative of international criminal law. In both cinematic investigations of international criminal law, and in the operation of international criminal law, defence lawyers tend to inhabit the margins. However, at the same time, the defence lawyer opens a space where a critique of international criminal law is made possible. How does the defence lawyer present international criminal law – and its anxieties, limitations, and possibilities? What does the defence lawyer force the observer to acknowledge about the operation of international criminal law?


In this article, I analyse of the depiction of international criminal defence lawyers in two juridical documentaries: *The Trial (of Ramush Haradinaj)* and *War Don Don*. These films offer rare examples of defence lawyers as a chief protagonist in the narrative of international criminal law, and thus allow a narrative to be told about defence lawyers. At the same time, they also allow defence lawyers to construct a narrative of international criminal law. I argue that these juridical documentaries, zooming in on the persona of the defence lawyer, allow alternative narratives of international criminal law to be told, in a way that the system of international criminal law and its trials do not readily allow.

In this article, I also draw on memories of my experience as a defence lawyer at the International Criminal Tribunal for the Former Yugoslavia (ICTY). These reflections are envisaged as a supplement to the main emphasis in this article, which is on the examination of the two films. Between 2009 and 2011, I worked for several defence teams, most particularly as Legal Assistant

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<sup>1</sup> See, for example, ‘The Reckoning’ (2009) ([HYPERLINK "http://skylight.is/films/the-reckoning/"](http://skylight.is/films/the-reckoning/) .

<sup>2</sup> See, for example, ‘The Court’ (2013) ([HYPERLINK "http://www.thecourt-movie.com/"](http://www.thecourt-movie.com/) .

<sup>3</sup> See, for example, ‘Milosevic on Trial’ (2008) ([HYPERLINK "http://icarusfilms.com/new2008/milo.html"](http://icarusfilms.com/new2008/milo.html) .

to the Standby Counsel in the case of Radovan Karadžić,<sup>4</sup> and Case Manager and Legal Assistant for the defence of Lahi Brahima (in the retrial of the case analysed in *The Trial*).<sup>5</sup> I raise these reflections here, partly in order to add a modest new set of information to the academic literature, through employing an auto-ethnographic methodology.<sup>6</sup> While several prosecutors have released memoirs,<sup>7</sup> there are far fewer life-writings of international criminal defence lawyers.<sup>8</sup> In a recent ‘oral history’ of the ad hoc tribunals, only three former defence lawyers are listed as having been interviewed (two of them had subsequently become judges). This compared to interviews with 11 prosecution staff.<sup>9</sup> It appears that prosecution ‘histories’ are more widely told than those of the defence, which correlates with the lack of defence lawyers in cinematic depictions of international criminal law. The auto-ethnographic reflections I offer here are therefore an attempt to tell a little more of these defence stories. As Immi Tallgren’s work has shown, sharing experiences and memories can record information which might otherwise be lost to history; and at the same time, these experiences can be deployed in order to critically reflect on the operation of international criminal law.<sup>10</sup>

I also draw on my experience as a defence lawyer in order to demonstrate how this experience exposed me to a critical understanding of international criminal law. In this way, the reflections

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<sup>4</sup> *Prosecutor v Karadžić*, (International Criminal Tribunal for the Former Yugoslavia, Case No IT-95-5/18-T).

<sup>5</sup> *Prosecutor v Haradinaj* (International Criminal Tribunal for the Former Yugoslavia, Case No IT-04-84bis-T).

<sup>6</sup> I draw here on the use of auto-ethnographic methodology employed by lawyers (P Williams, *The Alchemy of Race and Rights* (Harvard University Press, 1992)), jurists (see A Genovese, ‘Inheriting and Inhabiting the Pleasures and Duties of Our Own Existence: *The Second Sex* and Feminist Jurisprudence’ 38(1) *Australian Feminist Law Journal* (2013) 41), international lawyers (see the work of D Otto, particularly ‘The Gastronomics of TWAIL’s Feminist Flavours: Some Lunch Time Offerings’ 9 *International Community Law Review* (2007) 345), and international criminal lawyers (I Tallgren, ‘We Did It? The Vertigo of Law and Everyday Life at the Diplomatic Conference on the Establishment of an International Criminal Court’ 12(3) *Leiden Journal of International Law* (1999) 683).

<sup>7</sup> See, e.g., R Goldstone, *For humanity: reflections of a war crimes investigator* (Yale UP, 2000); C Del Ponte with C Sudetic, *Madame Prosecutor: Confrontations with Humanity’s Worst Criminals and the Culture of Impunity: A Memoir* (Other Press, 2009); L Arbour, *War Crimes and the Culture of Peace* (University of Toronto Press, 2002); H Verrijn Stuart and M Simons, *The Prosecutor and the Judge: Benjamin Ferencz and Antonio Cassese, Interviews and Writings* (Amsterdam UP, 2009); T Taylor, *The Anatomy of The Nuremberg Trials: A Personal Memoir* (Knopf Doubleday, 2012).

<sup>8</sup> One example of a defence lawyer’s memoir is J Vergès, *Le Salaud Lumineux* (Livre de Poche, 1997), however the fact that this is only available in French has probably restricted its readership. Defence lawyer Michael Karnavas keeps a regular blog which could be considered a form of life-writing (see { HYPERLINK "http://michaelgkarnavas.net/blog" } (last visited 29 August 2017)).

<sup>9</sup> Brandeis University, ‘Ad Hoc Tribunals Oral History Project’, available at { HYPERLINK "https://www.brandeis.edu/ethics/internationaljustice/oral-history/interviews/index.html" } (last visited 29 August 2017).

<sup>10</sup> Tallgren (1999).

on my life as a junior lawyer at the ICTY might seem shamefully unsophisticated, but this shows how my experiences as a defence lawyer moved me from being someone who believed in the mission of international criminal law, to someone who was far more willing to engage in critical conversations about the project. It is worth acknowledging, then, that in watching these documentaries, I come with particular knowledge and experience: I have worked with, or very nearby to, many of the lawyers shown in these films, and I have lived the same types of challenges that they describe. The telling of fragments of my story as a defence lawyer is designed to add to my analysis of the films, and the narratives the films depict about the placement of defence lawyers in the international criminal justice project (as I argue below, a place that is both marginal and yet integral), and how these lawyers view international criminal justice.

This article is structured in seven parts. First, I examine some preliminary issues around the juridical documentary form, and the particular films examined in this article. I then analyse some fundamental questions about international criminal law: its aims, the factors that affect its narratives, and the place of defence lawyers in international criminal law – in particular, how and why they inhabit a space of critique and marginalisation. I then outline how critiques can be made by defence lawyers: in the trial, through the use of the strategy of ‘rupture’; and in documentaries, which can provide an alternative forum for critiques to be made, potentially in a more expansive and effective manner. Next, I move to analyse the two films in greater detail, and I argue that the films present defence lawyers as offering an alternative understanding of international criminal trials in four main ways, which I address in turn. These are their inability to recognise the complex interactions between perpetration and victimhood, their inability to examine structural causes of conflict, their inability to determine ‘truth’, and their impetus towards conviction. In these ways, the juridical documentaries that center the stories of defence lawyers, also permit alternative narratives of the system of international criminal law. The critiques offered by these defence lawyers suggest ways in which they imagine international criminal law can be improved.

#### DOCUMENTARIES OF WAR CRIMES TRIALS: PRELIMINARY ISSUES OF FORM

*The Trial* and *War Don Don* are both ‘juridical documentaries’, or ‘non-fiction films whose primary discursive focus is on judicial proceedings or the administration of law’.<sup>11</sup> The return of

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<sup>11</sup> K Fuhs ‘The Legal Trial And/In Documentary Film’, 28 *Cultural Studies* (2014) 781, 783.

the documentary as a popular cinematic form over the last twenty or so years<sup>12</sup> has matched the post-Cold War rise of international criminal law, as understood in the ‘accepted history’ of international criminal law.<sup>13</sup> Juridical documentaries ‘use the legal trial as both a platform and a structuring device to contest the evidentiary value of testimony, bear witness to the performance of law in our culture and engage in a social debate about flaws in contemporary jurisprudence.’<sup>14</sup> Indeed, there are similarities between documentary and trial, both acting as an ‘operational system of narratives, rhetoric and performances that shapes conventional meanings and social behaviour’.<sup>15</sup> As a form, the documentary clearly differs qualitatively from fiction; it ‘carries a determinable link with the historical world’.<sup>16</sup> Moreover, while fiction tends to address the viewer as a private person, speaking to ‘feelings, sentiments and secret desires’, the documentary ‘addresses the viewer primarily as a citizen, member of civil society, putative participant in the public sphere’.<sup>17</sup> In many respects, this is what brings documentaries their authority and their ability to claim representation of ‘the truth’.<sup>18</sup> This heightens ‘the ethical and epistemological stakes’ of these films.<sup>19</sup>

Yet in reality, the documentary form is always ‘only a *representation* of reality’<sup>20</sup> and projects a certain form of truth. Documentaries are authored: they are created, primarily by a director, through techniques that include slicing particular images together; interviews that may be scripted, leading, and presumably without ethics approval; and the addition of music to images. What, for example, might be the reason to present (as one of these films does) the figure of a defence lawyer walking alone on a windy and grey beach?<sup>21</sup> As a viewer, we may have a sense of the defence lawyer being alone in the world, alienated, standing against challenges. This image is not without meaning, nor without affect. Indeed, while the documentary might appeal to us as citizens, it does not deny that as viewers we still have those ‘feelings, sentiments and secret desires’ – in fact,

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<sup>12</sup> M Chanan, *The Politics of Documentary* (British Film Institute, 2007), 3.

<sup>13</sup> S Nouwen, ‘Justifying Justice’ in J Crawford and M Koskeniemi (eds), *The Cambridge Companion to International Law* (Cambridge UP, 2012) 327, 328.

<sup>14</sup> Fuhs (2014) 783.

<sup>15</sup> Ibid.

<sup>16</sup> Chanan (2007) 4.

<sup>17</sup> Ibid, vi.

<sup>18</sup> Fuhs (2014) 783.

<sup>19</sup> Ibid.

<sup>20</sup> S Greenfield et al, *Film and the Law* (Cavendish Publishing, 2001), 77, emphasis in original.

<sup>21</sup> *The Trial*, 50 minutes. Of course, in other films, it is the prosecutor presented alone on the beach: see *The Reckoning*.

documentaries still appeal to these inner worlds, in order to gain legitimacy for the particular truth they present. As Alexander Kluge has noted, ‘the naïve treatment of documentation therefore provides a unique opportunity to concoct fables’.<sup>22</sup> Wouter Werner takes this further, and notes that documentaries ‘combine the *representation* of actuality with the *presentation* of an argument or point; a combination made possible by the filmmaker’s artistic tools’.<sup>23</sup> Through the use of particular techniques, a documentary will combine the representation (of actuality) and the presentation (of an argument), and ultimately the film will have a pedagogical aspect.<sup>24</sup>

To analyse the narratives about international criminal defence lawyers – and also to examine the narratives these lawyers present about the system of international criminal law – I chose to examine two juridical documentaries, primarily because they were the only two that I knew emphasised the defence lawyer as a chief protagonist. The 2009 film, *The Trial*, tells the story of the trial of Ramush Haradinaj at the ICTY, and focuses exclusively on the defence – in particular, centering on the experiences of the defence lawyers Michael O’Reilly and Andrew Strong. *War Don Don* (released in 2010) examines the trial of Issa Sesay at the Special Court for Sierra Leone (SCSL). This documentary includes interviews with and footage of both the defence and the prosecution, but unusually includes in-depth interviews with defence team members and exposition of defence team strategy. In this way, the film provides a particular emphasis on the defence that other documentaries do not offer. The viewer meets defence lawyers Sareta Ashraph and John Cammegh; and in particular Wayne Jordash is a central figure in this documentary.

Both of these films draw heavily on interview material and archival footage. Through the use of trial footage, the viewer sees the judges and the witnesses *in situ* in the court. In both films, the director employs a technique of splicing together footage of interviews and archival footage of the conflict, the accused, or the trial. Often, a scene might start with an interview, but then move to other footage, while still retaining the interview as a voiceover. Both films benefit from a large amount of interview material with the accused and the defence lawyers, as well as with other actors. This large amount of interview material provides a direct voice for the defence lawyers, and is also a relatively unusual presentation of the accused, in their own words. Neither film

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<sup>22</sup> As cited in Greenfield et al (2001) 77-78.

<sup>23</sup> W Werner, “‘We Cannot Allow Ourselves to Imagine What it All Means’: Documentary Practices and the International Criminal Court’ (2013) 3 *Law and Contemporary Problems* 319, 325.

<sup>24</sup> Ibid 326.

employs a narrator – extra information is conveyed through still images with words on them. In these ways, the films eschew an additional authoritative figure, instead resting the power of the narrative with the interviewees and allowing a focus ‘on the personal histories of those involved in the ... trial’.<sup>25</sup> The films are thus made in an ‘observational mode’, which emphasises ‘the non-intervention of the filmmaker’.<sup>26</sup> The effect of this ‘direct style’ is to ‘reach out much more directly to the viewer, sometimes leaving the impression that the viewer is personally present at the scene’,<sup>27</sup> and that the ‘persons and events, rather than an editing process, determine the content of the film.’<sup>28</sup>

Both *War Don Don* and *The Trial* were made by directors who had personal connection with the defence lawyers in these films. This has presumably given them greater access to the defence teams, and a solid understanding of the role of the defence lawyer. The director of *The Trial*, Rob O’Reilly, is the son of the defence lawyer examined in the documentary, Michael O’Reilly. Rebecca Richman Cohen, the director of *War Don Don*, was initially drawn to examine the trial of Issa Sesay when she was a legal intern for the defence of another accused at the SCSL.<sup>29</sup>

For the purposes of this article, I am interested in two main areas: the stories that are told about international criminal defence lawyers; and the stories that the lawyers tell about the system of international criminal law. Consequently, while watching these films, I have asked: How are international criminal defence lawyers portrayed in these films? What stories do these lawyers tell about themselves and their work? How do they explain the trial process and the system of international criminal law? These questions emphasise the issue of how the aims of international criminal law are portrayed; and as I will show, the narrative of the defence lawyer is quite different from other narratives around the aims of international criminal law.

#### AIMS AND NARRATIVES OF INTERNATIONAL CRIMINAL LAW, AND THE DIFFERENT SPACE OF DEFENCE LAWYERS

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<sup>25</sup> Werner (2013) 330.

<sup>26</sup> B Nichols, ‘Representing Reality’, as cited by Werner (2013) 328.

<sup>27</sup> Werner (2013) 329.

<sup>28</sup> Ibid, 339.

<sup>29</sup> R Richman Cohman, ‘Director’s Statement’, available at { [HYPERLINK "http://www.wardondonfilm.com/film"](http://www.wardondonfilm.com/film) } (last visited 10 August 2016).

*War Don Don* and *The Trial* present defence lawyers offering a critique of the aims of international criminal law, and the ability of trials to meet these aims. These films, released in 2009 and 2010, form a pre-cursor to a rise in scholarship taking a critical approach to international criminal law, which occurred from around 2012.<sup>30</sup> Many of the critiques presented in these films were increasingly also argued in the academic literature from this point. By ‘critique’ or ‘critical engagement’, I mean a sustained enquiry into ‘the very foundation, the context – including economic, political, and social conditions – and the limitations of ICL’.<sup>31</sup> Mikael Baaz has explained how this critique differs from mere criticism, which might examine any ‘insufficient means or deficient legal rules to provide trials and punishment, or simply poor institutional performance’.<sup>32</sup> As Sara Kendall argues, critique does not evaluate international criminal law ‘in terms of success and failure, but instead asks about underlying presumptions and conditions of possibility. For some critics this translates into a project of developing a more just legal field ... to improve from within, “through a sustained process of critique and reflection”’.<sup>33</sup> Critique can be valuable, therefore, precisely because it does not offer an opinion about the ‘failure’ of international criminal law, but instead, can engage with questions of the potential of the discipline, and how it can be encouraged to meet this potential. It is a constructive process and is often undertaken in the spirit of improving, rather than undermining, the legal system. In this section, I set out how aims and narratives intersect in international criminal law; and I then turn to the question of why defence lawyers are particularly able to engage in critique, and how these lawyers are marginalised in international criminal law.

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<sup>30</sup> See, eg, C Schwöbel (ed), *Critical Approaches to International Criminal Law* (Routledge, 2014); D Jacobs, ‘Sitting on the Wall, Looking in: Some Reflections on the Critique of International Criminal Law’ 28 *Leiden Journal of International Law* (2015) 1; C Stahn, ‘Between “Faith” and “Facts”: By What Standards Should We Assess International Criminal Justice?’ 25 *Leiden Journal of International Law* (2012) 251; T Krever, ‘International Criminal Law: An Ideology Critique’ 26 *Leiden Journal of International Law* (2013) 701. This scholarship drew on earlier important contributions to critical approaches to international law, including Tallgren (1999) and I Tallgren, ‘Sensibility and Sense of International Criminal Law’ 13 *European Journal of International Law* (2002) 561; G Simpson, ‘War Crimes: A Critical Introduction’ in Timothy McCormack and Gerry Simpson (eds), *The Law of War Crimes: National and International Approaches* (Kluwer, 1997) and G Simpson, *Law, War, and Crime* (Polity Press, 2007); M Koskeniemi, ‘Between Impunity and Show Trials’ 6 *Max Planck Yearbook of United Nations Law* (2002) 1; and M Drumbl, *Atrocity, Punishment and International Law* (CUP, 2007).

<sup>31</sup> M Baaz, ‘Review Essay: Dissident Voices in International Criminal Law’ 28 *Leiden Journal of International Law* (2015) 673, 688.

<sup>32</sup> Ibid.

<sup>33</sup> S Kendall, ‘Critical Orientations: A Critique of International Criminal Court Practice’, in Schwöbel (2014) 59, citing M Drumbl, ‘Pluralising International Criminal Justice’ 103 *Michigan Law Review* (2005) 101, 133.



International criminal law has an abundance of aims, including ending impunity, giving victims a meaningful voice, ensuring peace and reconciliation, deterring future crimes, providing an historical record of the conflict, a sociopedagogic or didactic function, and setting out the ‘truth’ of events.<sup>34</sup> This proliferation of aims does not come with any agreement on the interaction between these aims, and whether some should be emphasised, or others rejected.<sup>35</sup> There is also a lack of clarity around how the aims of the system of international criminal law might differ from the aims of international courts and tribunals, and international criminal proceedings (that is, trials).<sup>36</sup> While the system of international criminal law may have a number of aims, it is possible (and arguably desirable) that an international criminal trial should aim only to make a determination of an individual’s guilt or innocence for the crimes charged.<sup>37</sup>

The aims of international criminal law also provide a narrative for this system of law, and a way of explaining the value of international criminal law.<sup>38</sup> The system of international criminal law is intrinsically fragile, reliant as it is on the goodwill and cooperation of states (particularly for budgets, police, and access to investigation sites). States need a reason to support international criminal law, and the narratives around the aims of international criminal law give such reasons.<sup>39</sup> To convince these states, courts and tribunals must market their own existence.<sup>40</sup> Such ‘marketing’ work falls primarily to court employees – the press office, but also prosecutors, judges, and registry staff. The defence, however, is in a different position. They have no vested interest in presenting the system of international criminal law in a positive light. Indeed, a story of international criminal

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<sup>34</sup> There is a large literature on the aims of international criminal law, including Koskeniemi (2002); J Jackson, ‘Finding the Best Epistemic Fit for International Criminal Tribunals: Beyond the Inquisitorial–Adversarial Dichotomy’ 7 *Journal of International Criminal Justice* (2009) 17; M Damaška, ‘The Competing Visions of Fairness: The Basic Choice for International Criminal Tribunals’ 36 *North Carolina Journal of International Law and Commercial Regulation* (2001) 365; M Klamberg, ‘What are the Objectives of International Criminal Procedure? — Reflections on the Fragmentation of a Legal Regime’ 79 *Nordic Journal of International Law* (2010) 279; B Swart, ‘Damaška and the Faces of International Criminal Justice’ (2008) 6 *Journal of International Criminal Justice* 87; M Schrag, ‘Lessons Learned from the ICTY Experience: Notes for the ICC Prosecutor’ 2 *Journal of International Criminal Justice* (2004) 427, 428.

<sup>35</sup> S Rigney, *Fairness, The Rights of the Accused, and Procedure in International Criminal Trials* (PhD Thesis) (2015).

<sup>36</sup> Ibid.

<sup>37</sup> Ibid.

<sup>38</sup> S Rigney, ‘Postcard from the ICTY: Examining International Criminal Law’s Narratives’, D Joyce and J Hohmann (eds) *International Law’s Objects* (Oxford UP, forthcoming 2018).

<sup>39</sup> Ibid.

<sup>40</sup> See C Schwöbel, ‘The Market and Marketing Culture of International Criminal Law’ in Schwöbel (2014) 279; see also Rigney (2018); S Kendall, ‘Commodifying Global Justice: Economics of Accountability at the International Criminal Court’ 13 *Journal of International Criminal Justice* (2015) 113.

law's flaws may benefit their own narratives of how their client does not deserve (for whatever reason) to be found guilty. Yet, at the same time, these defence lawyers remain part of the apparatus of international law, and benefit from the employment of these trials. As I explain further below, these lawyers therefore operate in a space that is both internal, and external, to the institutions of international law. Structurally, then, defence lawyers are able to open a space of critique, in a way other actors are not able to.<sup>41</sup>

However, this ability to critique may cause defence lawyers to be distrusted by advocates of international criminal law. Some may conflate critique and criticism: any critique of international criminal law may be seen as an argument against the system of law, and in favour of impunity. Indeed, there has emerged a 'suspicion that those practicing critique were somehow endorsing mass atrocities'.<sup>42</sup> As outlined above, critique is not about merely criticising the system of international criminal law, and many critical thinkers are in fact engaged with an act of attempting to identify problems with the discipline, in order to address and improve such problems and ultimately improve justice processes. However, the confusion between negative criticism and critique (with its constructive elements) has caused a degree of distrust towards defence lawyers, and is one factor that marginalises them in the system of law.

Furthermore, as a system galvanised by the mission to 'end impunity', international criminal law structurally supports prosecutions, and therefore may discourage defence lawyers and others seen to be 'against' the system of law. Protecting human rights has increasingly been brought under the auspices of the international criminal legal system, and as Karen Engle has pointed out, there has been a rise in anti-impunity rhetoric among human rights organisations from the 1990s, when human rights advocacy moved from 'naming, shaming, and sometimes judicially trying states for their violations of human rights to finding ways to hold individuals criminally responsible for them'.<sup>43</sup> William Schabas has noted that there has been a shift in human rights law and advocacy

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<sup>41</sup> Defence lawyers, of course, are diverse: there are as many different personalities as there are lawyers, and ideologies, motivations, and views around the role of defence lawyers will differ. This article does not seek to homogenise defence lawyers, but rather seeks to draw attention to their structural place in international criminal law.

<sup>42</sup> C Schwöbel, 'Introduction' in Schwöbel (2014) 3.

<sup>43</sup> K Engle, 'Anti-Impunity and the Turn to Criminal Law in Human Rights Law and Advocacy' 100 *Cornell Law Review* (2015) 1070, 1071.

‘from a defence-based to a prosecution-based perspective’,<sup>44</sup> and ‘whereas in the past human rights law sought to protect the rights of the accused without real regard to guilt or innocence, it is now torn by another extreme, one that is orientated towards the victim and that thrives upon conviction’.<sup>45</sup> In a system that calls for a fight against impunity, defence lawyers may be seen as the embodiment of impunity, and hence viewed with suspicion.

When I first arrived in The Hague, I too felt suspicious of defence lawyers. I was just months out of law school, and a passionate believer in the system of international criminal law as the crucial way to fight impunity and ensure human rights. I considered prosecutors to be brave, and thought of them as protecting human rights and the victims of atrocities. On the other hand, I considered defence lawyers to be some form of vulture, profiting from misery; to be untrustworthy, slippery characters, who possessed no empathy for the victims of these crimes. Over the years I continued to meet many colleagues who would unashamedly voice similar opinions. With impressive regularity – even within the world of international criminal law – prosecutors were seen as heroes; defence counsel as villains.

After I became a defence lawyer, these views were replaced by an acute awareness of my own, new, marginalisation in the structure of international criminal law. People’s suspicion felt most insidious in the question, ‘but *how* can you defend *such people*?’ I lost count of the number of times I was asked a variation of this question, often at some otherwise pleasant dinner or event, always by another member of the international legal community. I was always taken aback – these people were prosecutors or legal officers, people who saw themselves as human rights defenders; I had thought they should know about the value of a fair trial. I would respond by invoking our shared work for human rights: ‘everyone has a right to a defence, it’s a basic human right, it’s Article 14 of the International Covenant on Civil and Political Rights’ – but in all the times this conversation happened, I never felt that I convinced the questioner of the worth of my position. One particularly memorable occasion was in my last few days of working at the ICTY. A prosecutor approached me to offer some ‘advice’: I should, he said, exercise more caution in who I chose to work for; in future, I should not choose to defend such people.

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<sup>44</sup> W A Schabas, ‘Balancing the Rights of the Accused with the Imperatives of Accountability’ in R Thakur and P Malcontent (eds), *From Sovereign Impunity to International Accountability: The Search for Justice in a World of States* (United Nations UP, 2004) 154, 155.

<sup>45</sup> Ibid 165.

Rebecca Richman Cohen, the director of *War Don Don*, has noted that as an intern for the defence at the SCSL, people would also ask her ‘How can you defend a war criminal?’, and, she says, ‘the film in some ways is a response to that’.<sup>46</sup> Indeed, such views are shown in the film. A fiery exchange between defence counsel and an ‘insider’ witness sets the scene for interrogations of the role of defence lawyers and the view of the lawyers that the system is tilted towards conviction. In this exchange, the witness reveals their view of the merits of being a defence lawyer. The witness accuses, angrily, ‘You are the defence counsel for defending people who have brought senseless war’.<sup>47</sup> Here, the viewer is exposed to the idea that defending those accused of international crimes is something to be ashamed of. This is a view that is reinforced in another scene, when the Court outreach service is conducting a session in a rural school. A teenage boy asks the employee of the defence team, ‘Why are they defending them?’<sup>48</sup> The question goes unanswered.

If defence lawyers are marginalised first by the anti-impunity mission of international criminal law, they have been marginalised further by the institutions and structures of international criminal law. Indeed, defence lawyers inhabit a space that is both internal, and external, to the institutions and processes of international criminal law. Although they are an integral part of the international criminal legal system and its trials, the defence has been treated quite differently from other arms of the courts and tribunals. For example, at the ICTY, the Association of Defence Counsel (ADC) is ‘not institutionally an organ of the Tribunal’.<sup>49</sup> The SCSL pioneered the existence of a ‘Defence Office’, which was a permanent institution with ‘a high degree of autonomy’<sup>50</sup> and an aim ‘to ensure the rights of suspects and accused persons’.<sup>51</sup> However, it was still ‘not in itself an independent organ of the SCSL’ but rather existed ‘within another organ of the court, the registry’.<sup>52</sup>

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<sup>46</sup> ‘Interview with Rebecca Richman Cohen’, available at { HYPERLINK "http://www.hbo.com/documentaries/war-don-don/interview/rebecca-richman-cohen.html" } (last visited 10 June 2017).

<sup>47</sup> *War Don Don*, 29 minutes.

<sup>48</sup> *War Don Don*, 1 hour 3 minutes.

<sup>49</sup> International Criminal Tribunal for the Former Yugoslavia, ‘Defence’, available at { HYPERLINK "http://www.icty.org/en/about/defence" } (last visited 8 June 2017).

<sup>50</sup> J Diekmann and M O’Leary, ‘The Role of Defense Counsel in the Pre-Trial Stage’, in C Rohan and G Zyberi (eds), *Defense Perspectives on International Criminal Justice* (Cambridge UP, 2017) 237, 244.

<sup>51</sup> *Ibid.*

<sup>52</sup> J RWD Jones and M Zgonc-Rožej, ‘Rights of Suspects and Accused’, in A Alamuddin, N Nabil Jurdi, and D Tolbert (eds), *The Special Tribunal for Lebanon: Law and Practice* (Oxford UP, 2014) 177, 191. The first international criminal tribunal to establish a defence office as a separate organ of the court was the Special Tribunal for Lebanon (*ibid.*). The International Criminal Court has the Office for the Public Counsel of Defence (OPCD),

Other practical aspects add to this marginalisation. Defence staff are paid in different ways than prosecution staff. In some instances, they even have more limited access to the building. At the ICTY, every employee had a security pass in order to access the building and to access particular areas in the building. The security pass of defence employees had a red border around the edge. Throughout the ICTY building, there would be signs that read ‘Red Pass Holders Not Allowed Beyond This Point’, to denote areas of the building where defence employees could not gain access. The separation of prosecution and defence areas is institutionally important, for the protection of materials (for both prosecution and defence), and for the appearance of impartiality. However, at the ICTY, non-Red Pass Holders could access the areas adjacent to the Defence rooms at the ICTY (which included photocopiers and places where documents might be able to be accessed), while Red Pass Holders could not access areas proximate to Prosecution offices.<sup>53</sup> While defence lawyers were restricted in their movements, similar restrictions did not appear to apply to prosecution staff.

In my experience, this status of ‘being a Red Pass Holder’ operated to simultaneously ostracise defence lawyers, and to make defence lawyers feel part of a club; defence employees considered being a ‘Red Pass Holder’ as somewhat a badge of honour, but also a marker of their difference, their perceived untrustworthiness. Defence lawyer Peter Robinson once described the frustration of being a ‘red pass holder’ to Frédéric Mégret:

I feel [inequality] every day at the ICTY, when you go into the building and there are bunch of signs of door [sic] that say people with red passes are not allowed to enter. The people with red passes are the defense, so there are large parts of the tribunal that we can’t go to ... those are just examples of ... things which show that there is not so much equality.<sup>54</sup>

In this way, the marginalisation of defence staff had a physicality; boundaries were drawn between the defence and the court staff. When I started work at the ICTY, I heard a story from other defence lawyers: during the early days of the ICTY, according to this story, the areas which ‘Red Pass

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again located within the remit of the Registry, although ‘this is solely for administrative purposes and it otherwise functions as a wholly independent office’ (ibid). On the challenges of the SCSL Defence Office, see A Thompson and M Staggs, *The Defence Office at the Special Court for Sierra Leone: A Critical Perspective* (War Crimes Studies Center, University of California, 2007).

<sup>53</sup> A reason given for this discrepancy was there was a budget for defence teams to hire separate office space outside the ICTY building – but come trial time, when lawyers were required to spend long hours close to the courtroom, the reality was that many defence teams had to use the Defence rooms at the ICTY.

<sup>54</sup> F Mégret, ‘The Legacy of the ICTY as Seen through Some of Its Actors and Observers’ 3 *Goettingen Journal of International Law* (2011) 1011, 1024.

Holders' were not allowed to access included the library and the canteen. ICTY staff who did not hold a 'Red Pass' – the prosecutors, the judges, the judges associates, the registry staff – were able to take lunch together; the defence were excluded. Regardless of whether or not this story was accurate,<sup>55</sup> it was legend among defence staff, and it was believed – and repeated – by many defence lawyers. The sense this story brings – of limited access, of dislocation, of being tolerated and yet not really being welcome – was at the heart of the 'Red Pass' system.

In these various ways, while defence lawyers are participants in the courts processes, they are somewhat alienated from the courts themselves. This unique position – simultaneously both within, and outside, the system of international law – can lead to an even greater capacity to engage in critique. While the marginal place of defence lawyers may be uncomfortable in many respects, it is also productive. As will be shown in the remainder of this article, defence lawyers allow these alternative narratives of international criminal law to be told.

#### RUPTURE AND / OR CINEMATIC NARRATIVE

In these documentaries, we see the defence lawyers offering their critique in two distinct settings: within the trial, as a particular defence trial strategy; and in narratives surrounding the system of international criminal law. These films demonstrate the ways in which defence lawyers build critiques into the trial itself, by a particular defence strategy that seeks to locate and contextualise the individual's criminal responsibility in broader societal issues. While the aim of any international criminal trial should be a forensic determination of an individual's guilt or innocence for the crimes with which they are charged, a defence lawyer's trial strategy may bring in greater contextual considerations, in order to challenge any alleged culpability. Indeed, well-known international criminal defence lawyer, Jacques Vergès, employed a courtroom strategy that would become known as 'rupture'.<sup>56</sup> This strategy is a 'practical and transformative way' of deconstructing international criminal law through courtroom strategy. The defence lawyer moves

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<sup>55</sup> I have no reason to think this story is not accurate – particularly given the numerous people who told me this story – but I have not been able to find a scholarly source to verify the anecdote. One public source appears to support the story: Michael Karnavas has written that, prior to the establishment of the Association of Defence Counsel at the ICTY ('ADC-ICTY'), 'unlike the prosecution and court staff, defense counsel were subjected to extra security, and had no access to the ICTY building other than the public lobby' (see M Karnavas, 'The ADC-ICTY Evolves into an Association of Defense Counsel Practicing before International Courts and Tribunals', 24 January 2017, available at { HYPERLINK "http://michaelgkarnavas.net/blog/2017/01/24/adc-icty-evolves/" \l "more-1907" } (last visited 29 August 2017)).

<sup>56</sup> J Vergès, *De la Stratégie Judiciaire* (Minuit, 1968).

‘beyond theoretical critique, the understanding of the interconnectedness between power and resistance, and the significance of the agency of the subaltern – or someone acting on behalf of the subjugated – by actively performing resistance in various international criminal trials’.<sup>57</sup> Rupture, then, is ‘critical theory put into practice’.<sup>58</sup>

The ‘rupture’ strategy is ‘conducted entirely as an attack on the system represented by the prosecution case’.<sup>59</sup> Martti Koskeniemi points out that ‘rupture’ is closely linked with Jean-Francois Lyotard’s idea of ‘différend’, or two incompatible frameworks, with rupture representing an attack on the opposition’s framework.<sup>60</sup> This differs from the strategy of ‘connivance’, where the defence team will focus on merely putting facts into doubt.<sup>61</sup> As Baaz has further explained,

When large political events are at stake in a trial, it will, by necessity, involve interpretations of the context, which are exactly what is disputed in the individual actions that are the object of the trial. To accept this, the terms in which the trial is performed – who should be the defendant and for what deeds, etc. – ‘is already [this] to accept one interpretation of the context among those between which the political struggle has been waged’ and, by extension, acknowledging legitimacy.<sup>62</sup>

‘Rupture’, in other words, is a denial of the way the prosecution has framed the terms of the trial. In showing that international criminal law is imposed selectively, or that there are contradictions in the system, ‘the defence can reverse the legal process and turn the defence into an attack against the legal system and the interests that it serves’.<sup>63</sup> Rupture brings into issue broader questions: of context, of power, perhaps of colonialism, structural violence, or ‘slow violence’.<sup>64</sup> It is a way of using ‘the arms of the powerful against the powerful (in unconventional ways). It is to use law as a means of resistance, to resist [international criminal law] and, by extension, the entire project of neo-liberal global governance’.<sup>65</sup>

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<sup>57</sup> Baaz (2015) 688.

<sup>58</sup> Ibid 689.

<sup>59</sup> Koskeniemi (2002), 26.

<sup>60</sup> Ibid.

<sup>61</sup> Ibid.

<sup>62</sup> Baaz (2015) 688, citing Koskeniemi. See also M Baaz and M Lilja, ‘Using International Criminal Law to Resist Transitional Justice: Legal Rupture in the Extraordinary Chambers in the Courts of Cambodia’ 2 *Conflict and Society: Advances in Research* (2016) 142. My thanks to Mikael Baaz for making this article available to me.

<sup>63</sup> Ibid, 689.

<sup>64</sup> For more on ‘slow violence’ and the relationship between international criminal law and Third World Approaches to International Law, see M Burgis-Kasthala, ‘Scholarship as Dialogue? TWAIL and the Politics of Methodology’ 14 *Journal of International Criminal Justice* (2016) 921.

<sup>65</sup> Baaz (2015) 689.

However, critique is not only undertaken as a trial strategy of rupture. In the analysis of the films that follows, we see defence lawyers enacting critique in the documentary film itself, as an alternative narrative for how international criminal law operates, and what is possible for international criminal law. These documentaries show that defence lawyers undertake critique in a complex manner, involving *both* trial strategy *and* broader appeals in formats like documentaries.

Juridical documentaries are a useful format to communicate critique, for at least the following reasons. First, while a trial is properly restricted to aim towards a forensic determination of the guilt of the accused, a documentary is not so confined, and broader inquiries are permitted – particularly, into *whether* the trial’s aims are appropriate, and *how* the trial is able (or unable) to meet these aims. As Mark Drumbl points out, stories (for Drumbl, literature; here, documentaries) ‘may not mesh with law’s story-telling capacities. These stories may contradict law’s angularity.’<sup>66</sup> Law is confined to a particular enquiry (guilt or innocence on the charges); but the narrative of a juridical documentary is potentially quite different – and on this point, more expansive – compared to the narrative of a trial.

Secondly, documentaries and trials have different audiences and different requirements. A trial strategy, even if it involves rupture, is directed ultimately towards the judges. Some critiques may not be accepted by judges in trial proceedings. For example, when making critiques in the trial setting, defence lawyers must be vigilant not to steer too closely to arguing that breaches of international humanitarian law were committed by the enemy, and therefore similar breaches by the client or their troops were justified: such an argument would fall foul of the *tu quoque* principle.<sup>67</sup> While this is appropriate, it is one example of a constraint upon the ability of defence lawyers to contextualise the actions of the accused. Documentaries, however, will be aimed at broader audiences. For this reason, documentaries allow more expansive critiques to be made and will not be constrained by the same requirements as trials.

Thirdly, there are affective differences between the trial and the documentary form. As explained above, documentaries are authored by filmmakers; their techniques (including presence or absence of a narrator, editing, and music) will allow them to present arguments, and can allow these

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<sup>66</sup> M Drumbl, ‘Victims who Victimise’ 4(2) *London Review of International Law* (2016) 217, 243. My thanks to Hemi Mistry for drawing this article to my attention.

<sup>67</sup> See *Kupreskic et al.* (International Criminal Tribunal for the Former Yugoslavia, Case No. IT-95-16), *Judgment*, 14 January 2000, 515-520.



arguments to be expressed in an affective register. While trials can be technical, procedural, and even boring, documentaries are naturally designed to be a spectacle; an engaging story. In these ways, critiques may be more powerful when made in a juridical documentary compared to a trial.

Hence, in the documentary format, critiques can be told coherently and expansively, communicated to wider audiences, and register on different affective registers. In these films, we see defence lawyers articulating four critiques in particular: they point out how international criminal law is not able to meet its aims through trial processes that see victimhood and perpetration as oppositional; that ignore questions of context and structure; that are unable to determine ‘truth’; and are skewed towards conviction. However, of these, only the first – the ideas of victimhood and perpetration – are shown in the documentaries as being raised in the trial itself, as part of a defence strategy. We see that this is unsuccessful: the critique does not have much resonance with the judges and other actors in the trial process, and it is ultimately rejected. This critique is able to be made more forcefully in the documentary. Meanwhile, the other major critiques are made in the documentary, but not necessarily in the trial process. In the following sections of this paper, I show how defence lawyers make these critiques in these documentaries.

#### HUMANITY, PERPETRATION, VICTIMHOOD: HOW INTERNATIONAL CRIMINAL DEFENCE LAWYERS NARRATE THEIR CLIENTS

Are people accused of committing war crimes evil, or human? This question is at the core of how international criminal lawyers explain their role in a trial process. Defence lawyers, as these films demonstrate, will often emphasise the humanity of their clients. Moreover, these defence lawyers complicate the idea of perpetration and victimhood, by showing that an individual can be both things at once.

I remember clearly my own transition, from wanting to be a prosecutor to being a defence lawyer. As I watched trials progress at the ICTY, my views on the accused changed – I went from seeing them as monsters, to understanding their humanity. It was this changed perspective that galvanised my work with the defence. I applied for an internship with a defence team, and over the coming years, I worked with three separate accused; in each case, I came to know them as a person, not just as a collection of actions that needed to be judged.

*War Don Don* depicts the prosecution and the defence as having two very different perspectives on the character and motivations of the accused. Was the accused evil, or flawed but human? Was the accused driven by greed and power, or was he driven by an attempt to improve his society? The prosecution present the accused as evil, crazy, and thuggish. The documentary shows footage of the prosecution opening statement, where prosecutor David Crane describes the accused as ‘dogs of war, hounds of hell’.<sup>68</sup> The documentary then cuts to a later interview with Crane. He sits in his office, bookshelves behind him, wearing a bow tie and suit; his hands are clasped at his chest. He describes the accused:

I can remember looking at Issa Sesay. I didn’t see anything. It was the first time that I actually looked into the eyes of a human being and realised – they have no soul. The hairs on the back of my neck actually bristled. From my point of view, it was almost a religious experience.<sup>69</sup>

As Crane recounts this experience, the image moves to Sesay sitting in court, wearing a bright yellow shirt and headphones to listen in to the court translation. Later, Crane describes the accused as ‘just thugs... they did it because they could. It was Mad Max Thunderdome. They just had fun doing it.’<sup>70</sup> In these ways, Crane has described the accused as dogs, as being without a soul, and as having some base desire for doing evil, ‘just because’. In Crane’s view, these are people who are mad, bad, and lacking humanity. Interestingly, this footage of Crane is spliced with archival footage of the leaders of the Revolutionary United Front, including particularly Foday Sankoh, articulating their demands: Sankoh is shown leading a chorus of people chanting ‘we want better medical treatment’, and later, as saying ‘the people asked us to take up arms. I think it is a democratic right for us to take up arms against a rotten system’.<sup>71</sup> The effect of this is to present two divergent stories of the war, while at the same time demonstrating how strongly Crane holds and articulates his views.

Meanwhile, this documentary shows the defence lawyer emphasising the humanity of his client, and seeking to engage with it. Early in the film, footage is shown of Sesay in detention, pacing the floors. There are images of locked doors and barbed wire. The viewer hears the voice of Wayne Jordash, describing Sesay as ‘fighting – literally – for his life’.<sup>72</sup> This is the first introduction of

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<sup>68</sup> D Crane, *War Don Don*, 11 minutes.

<sup>69</sup> D Crane, *War Don Don*, 12 minutes.

<sup>70</sup> D Crane, *War Don Don*, 21 minutes – 24 minutes.

<sup>71</sup> F Sankoh, *War Don Don*, 23 minutes.

<sup>72</sup> W Jordash, *War Don Don*, 9 minutes.

Jordash to the viewer. The film then moves to the image of Jordash being interviewed. Jordash appears to be contemplative, and thinking carefully about his choice of words. He speaks slowly: ‘I’m very happy to have met him, actually. He’s an intelligent, charming, at times bad tempered, at times very angry [...] overall, a man I’ve come to like a lot, actually’.<sup>73</sup> The footage of Jordash is spliced with images of Sesay in detention. Jordash continues to say that there is ‘no reason why we wouldn’t have been friends’ if circumstances had been different.<sup>74</sup> Jordash acknowledges that ‘I’m sure he’s capable of many things – I’m sure anyone who fights in a war for ten years is capable of many things. But how somebody is reflected in a prosecution allegation rarely sums up the individual’.<sup>75</sup> This quote is central to the way the documentary portrays Jordash’s interaction with Sesay: his belief that the actions do not dictate the only possible narrative of an individual’s life and character. Jordash’s words highlight Sesay’s humanity, yet the visuals of the film – moving between images of Sesay and Jordash – highlight the striking differences between the men: while Sesay is imprisoned, Jordash is free, educated, and able to speak on Sesay’s behalf. The role of the defence lawyer is, therefore, suggested in the slicing together of these images and this juxtaposition of the two men.

In *The Trial*, defence lawyers – those who are so often marginalised in international criminal law – are themselves humanised. The blurb for *The Trial* tells us that the documentary is about ‘a small team of lawyers [who] are engaged in a battle to prove the innocence of a man they have come to respect and admire. This is their story.’<sup>76</sup> Indeed, the story of O’Reilly and Strong is closely linked with how they perceive the innocence and responsibility of Haradinaj. In particular, they are presented as believing in his innocence for the crimes alleged, and in the worth of his prime ministership. This documentary presents Haradinaj as a prime minister who was taken from Kosovo to The Hague to face an investigation and trial that ultimately had no merit. Thus, the film opens with Michael O’Reilly interviewed in his office, stating ‘I am a lawyer, but I didn’t go to Kosovo to get involved with a war crimes trial ... I went there because the opportunity had arisen to work with a very able young prime minister, who was intent on building a modern democratic

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<sup>73</sup> Ibid.

<sup>74</sup> Ibid.

<sup>75</sup> Ibid.

<sup>76</sup> Trailer, *The Trial*, available { HYPERLINK "<http://directory.irishfilmboard.ie/films/765-the-trial>" } (accessed: 20 August 2017).

state in the heart of the new Europe'.<sup>77</sup> Repeatedly, the prosecution of Haradinaj is presented as a 'mistake'<sup>78</sup> or something that 'should never have happened'.<sup>79</sup> There is also a sense of closeness between lawyer and client. At one point, O'Reilly states 'I know Ramush very well'. Elsewhere, he acknowledges what he has sacrificed to act as Haradinaj's lawyer: he admits that taking on the Haradinaj defence work was 'trying in terms of personal life and family', but that the work just simply had to be done. The viewer has the sense that O'Reilly has prioritised this case above almost all else, because he believes in the leadership of Haradinaj and his innocence of the crimes as charged.

One of the more poignant scenes is of defence lawyer Andrew Strong, sitting in a café and stirring sugar into a coffee. The camera focuses alternatively on the sugar dissolving into the black coffee, and on Strong's face. He appears to be quite emotional; somehow both happy and nervous. He describes his role in the trial, and the personal challenges he has faced:

we came to believe in this man, and when you go around telling people you believe in this man, you are met almost overwhelmingly by skepticism at best, and often confrontation. People challenge you, they say 'no, this is a guilty man, this is a war criminal. He wouldn't be in the court if he wasn't guilty'. You start to feel really alone, thinking that this man is innocent, this man is worth believing in.<sup>80</sup>

This quote demonstrates both Strong's motivations for acting as a defence lawyer – that is, belief in the innocence of his client, and undertaking a role to establish that innocence – and also a certain sense of loneliness in undertaking his work. Strong is positioned *against* a system of law and even society, which believes him to be wrong in his view that his client is being incorrectly tried for war crimes. Strong repeatedly refers to the indictment as 'the indictment *we're* now facing'. This use of the word 'we' rather than 'my client' or 'Ramush' shows Strong's belief that he is somehow facing this indictment together with the accused.

Often, trials and the public presentation of international criminal law both weave narratives that tell of victims and perpetrators being entirely separate entities. But as these films point out, this dichotomy between victims and perpetrators is often not accurate, in the complex environment of conflict and atrocity. Both Haradinaj and Sesay are presented – by their defence lawyers – as men

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<sup>77</sup> M O'Reilly, *The Trial*, 0 minutes.

<sup>78</sup> R Haradinaj, *The Trial*, 8 minutes.

<sup>79</sup> M O'Reilly, *The Trial*, 21 minutes.

<sup>80</sup> A Strong, *The Trial*, 1 hour 9 minutes.

who were also victims of war. Haradinaj is shown speaking about the death of his brother Luan, and how that motivated his involvement in the conflict; Sesay is portrayed as having been a victim of socio-economic circumstances which brought him into the war. This victimhood is denied by the prosecution.<sup>81</sup> Yet as Mark Drumbl has pointed out, this is a false dichotomy; and this dynamic, of being both victim and perpetrator, is not infrequent in the world of atrocity. As Drumbl notes, ‘the lines between victims and victimizers in atrocity often are porous’.<sup>82</sup>

In the time since these films were released (and after the finalisation of the trials they depict), the question of the victim-perpetrator dynamic in international criminal law has arguably become even more acute, with the trial at the ICC of Dominic Ongwen. Ongwen, a former child soldier, is the first individual to be explicitly charged with crimes of which, as is widely acknowledged, he was also a victim. However, this case demonstrates that the trial process is not able to fully reckon with the complexity of the victim-perpetrator dynamic. Examining several passages from Prosecutor Fatou Bensouda’s opening address shows that – even in a case where the prosecution might acknowledge that the accused has also been a victim – this is considered to be largely irrelevant to the trial. Bensouda noted that Ongwen ‘could be kind’, but that ‘The reality is that cruel men can do kind things and kind men can be cruel’.<sup>83</sup> However, crucially, she made clear that it is the prosecution’s view that these questions of complex victimhood are outside the remit of the trial:

the focus of the ICC's criminal process is not on the goodness or badness of the accused person, but on the criminal acts which he or she has committed. We are not here to deny that Mr. Ongwen was a victim in his youth ... This Court will not decide his goodness or badness, nor whether he deserves sympathy, but whether he is guilty of the serious crimes committed as an adult, with which he stands charged’.<sup>84</sup>

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<sup>81</sup> See D Crane, *War Don Don*, 7 minutes; S Rapp, *War Don Don*, 1 hour 12 minutes.

<sup>82</sup> M Drumbl, ‘The Ongwen Trial at the ICC: Tough Questions on Child Soldiers’, *Open Democracy*, 14 April 2015, available at { HYPERLINK "<https://www.opendemocracy.net/openglobalrights/mark-drumbl/ongwen-trial-at-icc-tough-questions-on-child-soldiers>" } (last visited 15 September 2017). Kamari Maxine Clarke has also pointed out that in international trials, there is a particular ‘perpetrator figure’ invoked, which ‘is often seen as a figure of African tragedy and uncivilised violence’, and yet international criminal law deals inadequately with continuing violence like that of colonisation (K M Clarke, ‘Refiguring the perpetrator: culpability, history and international criminal law’s Impunity Gap’, 19(5) *International Journal of Human Rights* (2015) 592, 594.

<sup>83</sup> International Criminal Court, ‘Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, at the opening of Trial in the case against Dominic Ongwen’, 4 December 2016, available at { HYPERLINK "<https://www.icc-cpi.int/Pages/item.aspx?name=2016-12-06-otp-stat-ongwen>" } (last visited 15 September 2017).

<sup>84</sup> Ibid.

Bensouda's comments demonstrate that, as a medium of narrative, a trial process cannot abide the complexity of the victim/perpetrator dynamic. Trials are necessarily focused on only one side of an individual's story: a determination of their guilt for the crimes charged. Larger, contextual, stories are not permitted. There may be an attempt by defence lawyers, as these films show, to deploy a defence case strategy that involves setting out the reasons for the accused's actions. However, a documentary film can set out an alternative narrative – encompassing both culpability and victimhood – far more readily. Drumbl has written that the literary form 'nourishes the freedom to address the reality that, in times of atrocity, the divide between victimisers and victims blurs. Literary accounts of atrocity unpack the subtleties of and contiguities among victims and perpetrators ... criminal law, on the other hand, spurns any such blurring'.<sup>85</sup> These documentaries operate in a similar way to the literary form that Drumbl examines: they permit those stories of complex victim / perpetrator dynamics to be told, and heard, in a way that the lawful strictures of trials cannot accept.

Indeed, in *War Don Don*, to the limited degree that the humanity of the accused is raised in the trial as a defence strategy, we see that it is not successful. Jordash attempts to point out that if the prosecution is alleging that 'he was a nasty man [...] then surely it is a defence to say, "actually every day and every week and month he was doing his best to protect civilians"'.<sup>86</sup> The defence present evidence about how Sesay and his troops provided free medical treatment to civilians and soldiers, and they emphasise Sesay's role in the demilitarisation process.<sup>87</sup> In this way, the documentary shows this 'rehumanisation' as defence trial strategy. However, this fails: Sesay is convicted, and given one of the longest sentences delivered at the SCSL.<sup>88</sup>

However, as Jordash argues in *War Don Don*, the inability of the trial to engage in questions of humanity is not inevitable. Jordash is shown being interviewed to camera. In his view, it is not impossible to have a 'sensible' approach which involves the idea that 'individuals are not evil or good but may fall somewhere in the middle'. When this happens, 'you may have a process which can make fine distinctions, which can explore, which can describe accurately... rather than

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<sup>85</sup> Drumbl (2016) 218.

<sup>86</sup> W Jordash, *War Don Don*, 47 minutes.

<sup>87</sup> S Ashraph, *War Don Don*, 57 minutes.

<sup>88</sup> Sesay was ultimately sentenced to 52 years imprisonment. See *Prosecutor v Issa Hassan Sesay* (Special Court for Sierra Leone, Case No. SCSL-04-15-T), 'Sentencing Judgment', 8 April 2009.

demonising.<sup>89</sup> Here, we see Jordash engaging in critique that is aimed towards an imagination of what is possible for trial processes; Jordash is constructing an alternative hope, where international criminal law can be more nuanced in its consideration of the humanity of the accused.

#### INTERNATIONAL CRIMINAL DEFENCE LAWYERS AND THE STRUCTURAL CAUSES OF CONFLICT

Understanding that an accused can be both perpetrator and victim might invite an examination of the structural conditions that contributed to their actions. *War Don Don* and *The Trial* both show defence lawyers attempting to integrate these broader, structural, questions into any examination of the criminal responsibility of their clients. In these documentaries, the prosecutors are not presented as having any real interest in the court's ability to address the structural causes of war; but for the defence lawyer, this is shown as a primary anxiety. However, again, we see the limits of a trial as a place that can abide these conversations, and that these critiques may be more easily made in the documentary form.

In both films, the defence lawyers present their clients as being involved with a war fought to create a better world. It becomes a story not only of atrocity, but of an attempt to liberate their people (either from oppressors, in Haradinaj's case; or in Sesay's case, from poverty). The question of culpability is complicated, by the suggestion of motives that differ significantly from the prosecution's case. In *The Trial*, the conflict in Kosovo portrayed as a war of liberation, and one that had losses on both sides. Within the first two minutes of the documentary, the defence is shown in what appears to be their opening address to the court, with lawyer Ben Emmerson explaining the defence view on the conflict as 'a brutal and overwhelming experience' for the people of Kosovo.<sup>90</sup> This introduction – simultaneously to both the defence case, and the documentary – is a striking example of the defence building a narrative around the causes of the conflict.

*War Don Don* commences with Issa Sesay himself presenting a narrative about the role of the Court. The footage is of Sesay in detention, apparently watching a video of the trial processes. The images of the interview with of Sesay are slightly pixelated, giving the impression of a lower-quality film or a more rough filming process. These images are spliced with footage from the courtroom itself, and what would later become clear was the handing down of the trial judgment.

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<sup>89</sup> W Jordash, *War Don Don*, 1 hour 4 minutes.

<sup>90</sup> B Emmerson, *The Trial*, 1 minute.

The Court, Sesay says, has ‘a job to do... people must give account [for the crimes]; people should be punished’.<sup>91</sup> At this point, the footage reverts back to the courtroom, and the viewer is shown the judges giving their verdict in Sesay’s case: he is found guilty of many counts. The documentary immediately reverts to the footage of the interview with Sesay, and he makes the first statement about the placement of the accused within a criminal system, and the role of assigning criminality for mass crimes with particular individuals. Sesay says, ‘I was not born to be a criminal. The system made me – as the court look at me today they say I am a criminal’.<sup>92</sup> This idea of innate criminality or otherwise, located within a system that assigns criminality but refuses to see the structural surroundings for a person’s actions, becomes a major theme for the film. The documentary, deliberately juxtaposing Sesay’s guilt as determined by the court with his own refusal of criminality, highlights this theme.

In *War Don Don*, the defence lawyer and the accused present international criminal law as imperfectly suited to address the structural causes of conflict. Poverty, alienation, and lack of opportunity are all presented as both causes of this war, and reasons for Issa Sesay becoming involved personally in the conflict. Jordash argues that

If everything seems hopeless, if you seem so poor, if there is no prospect of becoming richer so that you can support your family and provide yourself with the basics, then the choice between picking up a gun or remaining in the dust – I’m not sure that should be so difficult for people to understand. There were good reasons for this war, which is not the same as justifying the crimes committed in it.<sup>93</sup>

At one point, the stories of Jordash and Sesay are juxtaposed, presented as being very similar stories of poverty and disconnection. Jordash tells his own story of coming from a ‘poor background, a working-class community in the North of England... Although it wasn’t desperate poverty like some places, it was still a place which was poor enough for it to matter, for it to prevent people from advancing, achieving, becoming something more than what their circumstances defined’.<sup>94</sup> This narrative does two things: first, it positions Jordash himself, and the reasons for him undertaking his work. Jordash is presented as someone who understands the challenges of being poor, and how this might drive a person’s choices in life and in committing

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<sup>91</sup> I Sesay, *War Don Don*, 3 minutes.

<sup>92</sup> Ibid.

<sup>93</sup> W Jordash, *War Don Don*, 34 minutes.

<sup>94</sup> W Jordash, *War Don Don*, 34 minutes.



crime (even in war). Secondly, it also introduces the story of Issa Sesay, whose narrative begins quickly after this. Thus, while the poverty experienced by Jordash would be quite different, in many respects, from that experienced by Sesay, the immediate juxtaposition in the documentary of these life stories is an interesting technique. Sesay took the stand in his own defence, and his testimony about his life is spliced into this documentary. He was born in 1970, went to school until he was 16 but ‘constraints made it hard to continue in school’.<sup>95</sup> The rest of the story demonstrates how, without poverty, Sesay might not have ended up involved in a violent conflict at all. In this way, the defence is shown as attempting to invoke a trial strategy of rupture, bringing in these broader, structural issues; yet, again, we see that this critique is not successful as a trial strategy.

As Tor Krever has noted, such ‘background contexts – including poverty, discrimination, marginalization, and social exclusion ... are eclipsed in [international criminal law] discourse and lost from sight by advocates of [international criminal law] as a panacea for atrocity’.<sup>96</sup> The aim of international criminal law – to end impunity, and individualise criminal responsibility – can lead to international criminal trials decontextualizing the actions of the accused. In fact, as Koskeniemi points out, through its focus on the individual, trials might ‘exonerate[e] from responsibility those larger (political, economic, even legal) structures within which the conditions for individual criminality have been created.’<sup>97</sup> Political and economic causes of conflict are particularly difficult to examine in a trial which is specifically designed to individualise culpability. These films demonstrate how challenging it is to raise these structural causes of conflict within a trial, and that such critiques are more easily made in the documentary narrative.

#### INTERNATIONAL CRIMINAL DEFENCE LAWYERS AS REVEALERS OF ‘THE TRUTH’ IN A FLAWED SYSTEM

Truth-finding and truth-telling are routinely invoked as aims of international criminal law.<sup>98</sup> Fact-finding is crucial to the trial, because trial processes are predicated on the basis that ‘a true account of events underlying the criminal prosecution can be discovered with a degree of accuracy that

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<sup>95</sup> I Sesay, *War Don Don*, 37 minutes.

<sup>96</sup> Krever (2013) 719-720.

<sup>97</sup> Koskeniemi (2002) 14; see also Krever (2013); Tallgren (2002), 594.

<sup>98</sup> Simpson (2007) 5; Damaška (2001); Koskeniemi (2002); Jackson (2009); L Douglas, *The Memory of Judgment: Making Law and History in the Trials of the Holocaust* (Yale UP, 2000).

legitimizes a verdict and, thus, the process as such'.<sup>99</sup> In international criminal law, this 'truth-seeking' function is seen as holding instrumental purposes - to assist the healing of the victims, through public recognition of injustice; to bring the conditions for affected communities to recover from trauma; and to restore the dignity of the victims.<sup>100</sup> It is also valued for disallowing the space for denial: setting out a record of the events may protect against historical revisionism.

Yet there are differences between legal 'truth' and historical 'truth'.<sup>101</sup> Historical 'truth' seeks to go beyond the culpability of the accused, to broader questions of context, and to determining 'what really happened'. However, as Fergal Gaynor points out, there are several limitations on the ability of international criminal trials to create full historical records: jurisdictional constraints; legal relevance; prosecutorial discretion; the range of the indictment; confidentiality restrictions; plea agreements; and finally, the exclusion of relevant evidence.<sup>102</sup> Where a trial chamber concerns themselves with these questions of historical truth – or suggests somehow that historical truth is the same as legal truth – they can be said to have gone beyond the remit of their work, or to be misrepresenting how much an international criminal trial can be expected to achieve.

In these films, the ability of the trial to reach 'the truth' is questioned by the defence lawyers. In particular, in *War Don Don* the unwillingness of the Trial Chamber to examine the structural causes of conflict is presented by Jordash and his team to be an impediment to the truth-seeking function. Jordash argues that 'you can't select these few people (for indictment) and expect the historical narrative to be particularly balanced or accurate'.<sup>103</sup> Elsewhere, footage of Jordash in his court robes, getting ready for court – putting his documents together, loading up a backpack with binders of documents, and walking to the court – is overlaid with a voiceover. We hear Jordash saying that he believes that 'there is little prospect you're going to get close to the truth, except if the defence do a good job, and except if anyone is listening to the defence case.'<sup>104</sup> And in *The Trial*, O'Reilly states that 'There is no one truth in all this, it is a complicated picture and will

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<sup>99</sup> M Fedorova, *The Principle of Equality of Arms in International Criminal Proceedings* (Intersentia, 2012) 78. On fact-finding in international criminal trials, see N Combs, *Fact Finding Without Facts: The Uncertain Evidentiary Foundations of International Criminal Convictions* (CUP, 2010).

<sup>100</sup> Koskenniemi (2002) 4.

<sup>101</sup> Ibid 10. See also Rigney (2015) 52.

<sup>102</sup> F Gaynor, 'Uneasy Partners — Evidence, Truth and History in International Trials' 10 *Journal of International Criminal Justice* (2012) 1257, 1263–70. On the ability of international criminal trials to 'write history', see R Wilson, *Writing History in International Criminal Trials* (CUP 2011).

<sup>103</sup> W Jordash, *War Don Don*, 10 minutes.

<sup>104</sup> W Jordash, *War Don Don*, 1 hour 4 minutes.

never be any clearer than it is now'.<sup>105</sup> In both films, then, the documentary form is used to critique the ability of the trial to meet its truth-telling aim.

#### ROLE OF DEFENCE LAWYERS IN CRITIQUING THE PRO-CONVICTION BIAS OF INTERNATIONAL CRIMINAL LAW

International criminal law is a system that rests upon 'ending impunity' through emphasising trial and punishment. As Gerry Simpson notes, it is a system that is 'passionately punitive'.<sup>106</sup> Both sets of defence lawyers in these documentaries critique the punitive nature of the system: either as charge with no hope of conviction (*The Trial*), or modes of liability and trial processes that lead to overzealous convictions (*War Don Don*).

A major critical argument made by the defence lawyers in *The Trial* is that the trial was pursued at all when there was no case to answer. The position is that a trial should not be run, unless there is a likelihood of conviction. This is accurate, but also uncomfortable to hold alongside the idea that convictions should not be the necessary outcome of trials. In *War Don Don*, Jordash states that there is 'such an impetus towards convicting everybody before the court and that doesn't lend itself to a truth-finding process'.<sup>107</sup> This 'impetus' is challenged by the fact of Haradinaj's acquittal, but the fact that Haradinaj was charged at all – when there appears to be so little evidence against him – suggests that perhaps even when there is no conviction, even the process of charging is punitive.<sup>108</sup>

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<sup>105</sup> M O'Reilly, *The Trial*, 50 minutes.

<sup>106</sup> Simpson (1997) 15.

<sup>107</sup> W Jordash, *War Don Don*, 32 minutes.

<sup>108</sup> Haradinaj's co-accused, Idriz Balaj, was also acquitted on all counts, while the third co-accused, Lahi Brahimaj, was convicted on two counts and sentenced to six years imprisonment (*Prosecutor v Haradinaj* (International Criminal Tribunal for the Former Yugoslavia, Case No IT-04-84-T), 'Judgement', 3 April 2008). The trial suffered from challenges obtaining witness testimony, described particularly at pages 14-18 of the Judgement (ibid). Ultimately, 90 witnesses were heard in the trial. On Appeal, the prosecution alleged that there had been 'witness intimidation' (*Prosecutor v Haradinaj* (International Criminal Tribunal for the Former Yugoslavia, Case No IT-04-84-A), 'Prosecution Appeal Brief', 16 July 2008, paragraph 3). The subsequent Appeals Chamber Judgement stated that there had been witness intimidation (see *Prosecutor v Haradinaj* (International Criminal Tribunal for the Former Yugoslavia, Case No IT-04-84-A), 'Judgement', 19 July 2010, paragraph 35). However, Gentian Zyberi points out that 'This is either a conclusion based on the trial record, without any reference to it however, or a rather serious mischaracterization of the quoted Trial Chamber's finding, which did not speak about witness intimidation' (G Zyberi, 'The ICTY Appeals Judgment in the Haradinaj case', *EJILTalk!*, 11 October 2011, available at { [HYPERLINK "https://www.ejiltalk.org/the-icty-appeals-judgment-in-the-haradinaj-case/"](https://www.ejiltalk.org/the-icty-appeals-judgment-in-the-haradinaj-case/) } (last visited 1 November 2017). Whether there was any witness intimidation in this trial was therefore contested, but there was no finding of intimidation by the Trial Chamber. Ultimately, the Appeals Chamber ordered a retrial of the acquittal. That retrial secured the testimony of 56 witnesses, including two particular witnesses 'with respect to whom the retrial was

Perhaps because of the strong belief of these lawyers in the innocence of their client and their view that he should never have been taken away from Kosovo to be tried (along with his eventual acquittal on all charges), *The Trial* presents a strong critique of the system of international criminal law. O'Reilly is blunt:

You can argue the system now works, but the system failed in that they indicted a wholly innocent man and took him away for three years. That's a long time for someone to be partly imprisoned, away from his family, his life restricted and for a prime minister to be out of office. There's something very wrong in a system that can lay 37 charges of war crimes against a man to have every single one thrown out because the prosecution brought no evidence, because there was no evidence. That's not justice. Justice is not three judges sitting at a trial, it's the whole process – indictments, finding evidence, ethical prosecutions.<sup>109</sup>

After the acquittal of Haradinaj, the defence is portrayed as jubilant, and uncompromising towards the prosecution. Filmed as they leave the ICTY building, Strong refers to the judgement as a 'fuck you' towards the prosecution, and O'Reilly says that it was 'a fucking crock of an indictment'.<sup>110</sup> Strong continues, saying that the delighted response of the public gallery to the acquittal 'was the best thing, to hear the entire gallery go berserk, the most heart-mending thing'.<sup>111</sup> There is something both understandable about their joy that a man they perceive to be innocent is free, but simultaneously uncomfortable at the celebration of a judgment that has arisen, ultimately, from the discovery of a mass grave.

In *War Don Don*, Jordash is clear that he thinks the pro-conviction bias in international criminal law is undermining the system of law. At one point, Jordash says that 'This court doesn't appear to have conducted the necessary enquiry into the evidence and if one reads the judgment one can see it is basically the highlights of the prosecution case'.<sup>112</sup> Another scene shows Jordash working in his office. On his desk, there is a motion for increased defence funding, which reads that 'Counsel has made known to the Trial Chamber that his team's ability to continue the Sesay defence would be dependent on their receiving the awarded additional funds without delay'. Someone has scribbled over this document the words 'Insanity Rules!' In a voiceover, we hear

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ordered' (*Prosecutor v Haradinaj* (International Criminal Tribunal for the Former Yugoslavia, Case No IT-04-84bis-T), 'Public Judgement with Confidential Annex', 29 November 2012, paragraph 4). On 29 November 2012, this retrial resulted in the acquittal for all three of the accused on all the counts they faced.

<sup>109</sup> M O'Reilly, *The Trial*, 1 hour 5 minutes.

<sup>110</sup> *The Trial*, 1 hour 4 minutes.

<sup>111</sup> A Strong, *The Trial*, 1 hour 4 minutes.

<sup>112</sup> W Jordash, *War Don Don*, 1 hour 1 minutes.

Jordash's voice saying that he is 'absolutely sick and tired of the whole thing, actually. I don't think this Court can do the job it is required to do. You have to get convictions to justify the amount of money being spent. Wrap that up with the huge emotion that characterizes these types of crimes, it is difficult for that process, the prosecution case to be a nuanced one.'<sup>113</sup> Again, it is hard to imagine this critique being made within the trial itself; it is the documentary form – interviewing Jordash in his office, surrounded by appeals for more defence funding – which permits this narrative to be told.

I remember what it was like to be 'sick and tired of the whole thing'. I left The Hague after two years of being a defence lawyer. I left for all sorts of reasons. Some were personal, and some were associated with the shape of my employment as a defence lawyer; and in truth, these motivations intersected and compounded each other. The grief of my mother's death was made even worse by pronounced job precarity; the stigma I routinely faced as a defence lawyer was more challenging because of my homesickness. While many of the assaults were minor – the marginalisation of being a 'red pass holder', the battles with broken office equipment – they acted together. They were also exacerbated by poor workforce issues: for example, at one point I spent six months without being paid (although I was working very long hours). These concerns were particularly felt by junior staff, who worked without a sense of being able to challenge such structural constraints. By the time I left, I was exhausted, and felt dislocated within the international criminal justice project. As I have written elsewhere:

This seemed so at odds with the international legal mission I had wanted to work with: one I had thought would be fair. To have defence staff so stretched felt like an affront to the workings of the entire system of law ... It felt like we were constantly operating in an environment of rough terrain, with the challenges we faced having the effect of undermining the rights of the accused.<sup>114</sup>

Having come to international criminal law as a way of defending human rights, I now felt that the structure of international criminal law made it difficult for me to defend the human rights of my client. Working as a defence lawyer exposed me to the idea that international criminal law was not an unqualified good: instead, it is a complex system that requires continual examination, evaluation, and ultimately improvement.

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<sup>113</sup> W Jordash, *War Don Don*, 1 hour 3 minutes.

<sup>114</sup> [reference omitted to ensure blind review]

## REIMAGINATION?

These two films demonstrate a particular understanding of international criminal law and its limitations. Through the defence lawyer, these films offer a critique of the aims and narratives of international criminal law, particularly around how the complex interactions between perpetration and victimhood, the structural causes of conflict, its inability to determine ‘truth’, and its impetus towards conviction. Instead, the defence lawyers in these documentaries suggest that international criminal law is too blunt an instrument to use to address a complicated world, and a complicated human nature which is capable of both good and evil; where individuals can be both victim and perpetrator, both responsible and constrained.

The critique offered by a defence lawyer comes partly from the unique space occupied by defence lawyers: both marginalised in the system of international criminal law, and yet central in the trials themselves. Defence lawyers are able to engage in questions of whether international criminal law is, in fact, able to achieve its stated aims; and whether those aims are actually appropriate. Defence lawyers engage with such critiques through the trial strategy of rupture, as well as articulating these concerns in the documentaries themselves.

By tracking the role of international criminal defence lawyers in these documentaries, we are exposed to ideas around how the system of international criminal law is flawed, but capable of betterment. This is in line with the idea of critique as something which enquires into the ‘conditions of possibility’ for the field, rather than just considering the successes and failures of the field.<sup>115</sup> In *War Don Don*, Wayne Jordash sets out his hopes, for both his client and the system of international criminal law. It is a moment where the viewer is presented with the optimistic side of the defence lawyer. Jordash’s hopes articulate again his belief in the humanity of his client, and his view that international criminal law is a system unable to address the complexities of conflict. In an interview to camera, the smile on his lips fading as he continues to talk, Jordash says: ‘Well, my naïve hopes [...] are that I’ll see him free and I’ll take him for a drink and have dinner with him...’ The film moves to footage of Jordash leaving Sierra Leone after the trial, and he continues: ‘My hopes for international criminal law – is that we find another way.’<sup>116</sup> This moment summarises the depiction of international criminal defence lawyers in the juridical documentaries

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<sup>115</sup> Kendall (2014) 59.

<sup>116</sup> W Jordash, *War Don Don*, 1 hour 18 minutes.

of *War Don Don* and *The Trial*: to put forward an alternative view, both of your client and of the international criminal legal system; to promote your client's best characteristics, but to challenge the worst characteristics of international criminal law in the hope of 'finding a better way'. While this moment is critical of international criminal law, it also shows optimism: the defence lawyer is portrayed as someone working within a system but seeking its improvement through critique.